[*Editorial Note*: We reproduce below the dissenting judgment of Anuar CJ (Malaya) which was received after the publication of the report at [1997] 1 MLJ 1.]

Arulpragasan a/l Sandaraju v Public Prosecutor

FEDERAL COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 05-237-92
EUSOFF CHIN CHIEF JUSTICE, LAMIN PCA, ANUAR CJ (MALAYA), MOHD AZMI, EDGAR JOSEPH JR, MOHD DZAIDDIN AND WAN ADNAN FCJJ
27 JULY AND 2 DECEMBER 1996

Cases referred to

A Ragunathan v PP [1982] 1 MLJ 139
Haw Tua Tau v PP [1981] 2 MLJ 49
Khoo Hi Chiang v PP [1994] 1 MLJ 265
Junaidi bin Abdullah v PP [1993] 3 MLJ 217
Munusamy v PP [1987] 1 MLJ 492
Pavone v PP [1984] 1 MLJ 77
PP v Omar Lopez [1967] 2 MLJ 281
Tan Boon Kean v PP [1995] 3 MLJ 514

Legislation referred to

Criminal Procedure Code (FMS Cap 6) s 180

2 December 1996

Anuar CJ (Malaya): I have had the benefit of reading the judgments in draft of my learned brothers, Mohd Azmi and Edgar Joseph Jr FCJJ. With respect, I fully agree with the view expressed by my learned brother Mohd Azmi FCJ. In view of the important issues raised in this appeal, I feel I should give my view separately.

On the evidence and on the facts, I agree that the defence has raised a reasonable doubt in the prosecution case. The appeal should be allowed, the conviction quashed, the appellant acquitted and discharged and the sentence of death be set aside.

In the course of the appeal, the learned counsel for the appellant invited the court to consider the question of burden of proof required to establish a case for the prosecution under s 180 of the Criminal Procedure Code (FMS Cap 6) ('the CPC'). It was argued on behalf of the appellant by the learned counsel that the prosecution is required to prove its case beyond reasonable doubt. It was argued that under s 180 of the CPC, unless the prosecution proves its case beyond reasonable doubt, the court should not call for the defence. A number of leading authorities have been cited. The more important cases are *Haw Tua Tau v PP* [1981] 2 MLJ 49; *Khoo Hi Chiang v PP* [1994] 1 MLJ 265 and *Tan Boon Kean v PP* [1995] 3 MLJ 514.

Section 180 of the CPC provides as follows:

> When the case for the prosecution is concluded the court, if it finds that no case against the accused has been made out which if unrebutted would warrant his conviction shall record an order of acquittal, or, if it does not so find, shall call on the accused to enter on his defence.

The section provides for two stages in the proceedings in a criminal trial. In the first part, the law requires the prosecution to establish a case against the accused. At the end of the close of the prosecution's case, the court is required to consider whether, upon the evidence as adduced by the prosecution, the accused's defence should be called. In the landmark case of *Haw Tua Tau*, it was decided that the court is not required to make up its mind at the end of the prosecution's case whether the evidence adduced by the prosecution has by then already satisfied it beyond reasonable doubt that the accused is guilty. In his judgment, Lord Diplock said (at p 51):

> For reasons that are inherent in the adversarial character of criminal trials under the common law system, it does not place upon the court a positive obligation to make up its mind at that stage of the proceedings whether the evidence adduced by the prosecution has by then already satisfied it beyond reasonable doubt that the accused is guilty. Indeed, it would run counter to the concept of what is a fair trial under that system to require the court to do so.

Lord Diplock went on to elaborate on this fundamental principle in the following terms (at the same page):

> Whoever has the function of deciding facts on the trial of a criminal offence should keep an open mind about the veracity and accuracy of recollection of any individual witness, whether called for the prosecution or the defence, until after all the evidence to be tendered in the case on behalf of either side has been heard and it is possible to assess to what extent (if any) that witness's evidence has been confirmed, explained or contradicted by the evidence of other witnesses.

The pronouncements of Lord Diplock are consistent and co-terminous with the principles of fair hearing and common sense. In 1962, Lord Parker CJ had provided certain guidelines to the justices and magistrates in the same vein in the following terms (see Practice Note reported in [1962] 1 All ER 448):

> A submission that there is no case to answer may probably be made and upheld;
>
> (a) when there has been no evidence to prove an essential element in the alleged offence;
>
> (b) when the evidence adduced by the prosecution had been so discredited as a result of cross examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it.
>
> Apart from these two situations, a tribunal should not in general be called on to reach a decision as to conviction or acquittal until the whole of the evidence which either side wishes to tender has been placed before it.

A It is evident that the guideline provided by Lord Parker and the principle enunciated by Lord Diplock show that the prosecution need only prove a prima facie case for the defence to be called. The guideline provided by Lord Parker had in fact received judicial approval by Williams J in the case of *PP v Omar Lopez* [1967] 2 MLJ 281. Williams J held that (at pp 281–282):

B

> I think however that the position becomes much clearer as to what is meant by 'no case to answer' when one looks at a trial which involves the use of a jury. For a judge at the close of the case for the prosecution in such instance to say that the prosecution has proved the guilt of the accused beyond reasonable doubt would be tantamount to his being enabled to say that the
> C jury must in law find the person guilty and so make him decide the case. That cannot be the law.
>
> ... The position then is that at the close of the prosecution, upon submission being made, a magistrate must ask himself not whether he is satisfied that the prosecution has proved the case beyond reasonable doubt, but whether there is evidence which if believed by reasonable men — it
> D follows that it must be capable of such belief — would justify such men in convicting the accused of the offence charged. If he comes to the conclusion that there is no such evidence, then he may acquit.

The view in *PP v Omar Lopez* has again been repeated by *Haw Tua Tau*. *Haw Tua Tau* did not introduce anything new in criminal procedure but
E merely an amplification of what has already been practised. It was therefore not surprising that Raja Azlan Ag LP followed *Haw Tua Tau* with approval in *A Ragunathan v PR* [1982] 1 MLJ 139. In his judgment, Raja Azlan Ag LP said (at p 141):

> Applying that principle, the learned magistrate at the close of the
> F prosecution's case had to determine as a question of law whether on the evidence as adduced and unrebutted, the applicant could lawfully be convicted, that is to say, whether there was with respect to every element in the charge some evidence which, if accepted, would either prove the element directly or enable its existence to be reasonably inferred. That is the question raised in the appeal. It must be distinguished from the question of fact for ultimate decision, which is whether on the evidence as a whole the prosecution
> G has proved to the satisfaction of the court, as a tribunal of fact, that the applicant is guilty as charged.

The interpretation of s 180 of the CPC came up for consideration again in *Tan Boon Kean v PP* [1995] 3 MLJ 514. The court decided that *Khoo Hi Chiang* did not fully consider s 180 because no discussion was made on the
H word 'case' appearing in the section. *Tan Boon Kean*, in my view, did not find that *Khoo Hi Chiang* was in any way wrong in law but merely proceeded to discuss that question which was not considered by *Khoo Hi Chiang*.

A leading member of the Bar, Mr Lim Kean Chye had occasion to
I give his view on the effect of *Haw Tua Tau*. Mr Lim's comments are found in [1983] 1 MLJ cxiii. Mr Lim expressed his view in these words (at pp cxiii–cxiv):

To suggest as some have done that the Privy Council does not require credibility to be considered would be wrong. In the last paragraph of its advice, the Privy Council refers to the 'rigorous test of credibility'. Credit is an important element in Lord Parker's Practice Note.

In practical terms, *Haw Tua Tau*'s case should present few difficulties. An article by Prof GL Peiris, 'The Burden of Proof and Standards of Proof in Criminal Proceedings: A Comparative Study of English Law and a Codified Asian System' (22 Mal LR 66) will be of interest. Professor Peiris's formula is:

> 'In criminal cases, the prosecution discharges its evidential burden by adducing sufficient evidence to raise a prima facie case against the accused. If no evidence is called for the defence, the tribunal of fact must decide whether the prosecution has succeeded in discharging its legal burden by proving its case beyond a reasonable doubt. If evidence is called by the defence, the question is what effect this evidence has on the overall legal burden which the prosecution is required to discharge.'

With the necessary correction which must be made in view of *Haw Tua Tau* this passage should serve as a practical guide to magistrates. If the difference between the evidential burden and the legal burden is kept in mind, the assumption that *Haw Tua Tau* has lightened the burden of proof will be seen to be an unjustified reading of the case.

With respect, I am in complete agreement with the view expressed by Mr Lim Kean Chye. *Haw Tua Tau* did not rule that the prosecution is not required to prove its case beyond reasonable doubt. The burden of proof in a criminal case remains the same. The prosecution is required to prove its case beyond reasonable doubt in order to find the accused guilty.

In the case of *Pavone v PP* [1984]1 MLJ 77, the learned judge Edgar Joseph Jr J (as he then was) was clearly of the view that what the court should consider at the close of the prosecution's case is whether a prima facie case had been made out. The learned judge in his judgment said (at pp 78–79):

> The learned president has written well-arranged grounds of decision and plainly recognized the force of these submissions but concluded by saying that she 'could attach no weight to the evidence of the test conducted by PW7'. She reasoned that there was 'no evidence that PW7 had even the most basic training in chemistry'. Nor was there 'any evidence as to what sort of test was used or whether PW7 was properly instructed on the use of it'. She accordingly ruled that there was a case to answer and when the appellant elected to say nothing, she observed that she had no alternative but to find him guilty as charged.
>
> Before I proceed to consider Mr Karpal Singh's submissions, I think I should make some comments on the above observation by the learned president even though neither counsel did so. It is implicit in the observation that the learned president had determined the issue of the veracity and accuracy of recollection of the witnesses for the prosecution before she called upon the defence. This was clearly wrong as it amounted to a provisional verdict of guilty thus raising the question whether the appellant was deprived of the substance of a fair trial, a matter of the first importance in the administration of criminal justice in any country following a common law system.

A Now, the sole question at the close of the case for the prosecution is whether or not a prima facie case has been made out, that is to say, whether there is some evidence (not inherently incredible) which, if believed, establishes the essential elements of the offence charged. If there is such evidence, then the defence must be called but care must be taken to leave suspended the question of the veracity and accuracy of recollection of
B witnesses until after the close of the case for the defence.

It is regretted that *Khoo Hi Chiang* chose to depart from the well established principle as enunciated in the earlier decisions of the Federal Court in *Ragunathan*, followed by the (then) Supreme Court in *Munusamy v PP* [1987] 1 MLJ 492 and *Junaidi bin Abdullah v PP* [1993] 3 MLJ 217.

C In my view, the principle enunciated in *Haw Tua Tau* — followed by *Ragunathan*, *Munusamy*, *Junaidi* and other cases — is still the correct principle to follow. The prosecution need only prove a prima facie case at the close of the prosecution. If the prosecution has established a prima facie case, then the court must call upon the accused to give his defence.

D

E

F

G

H

I